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No. 337

In the Supreme Court of the United States

OCTOBER TERM, 1944

INTERNATIONAL UNION OF MINE, MILL AND
SMELTER WORKERS, LOCALS Nos. 45, 17, 107, 108,
AND 111, AFFILIATED WITH THE CONGRESS OF IN-
DUSTRIAL ORGANIZATIONS, PETITIONERS

v.
EAGLE-PICHER MINING AND SMELTING COMPANY,
A CORPORATION, AND EAGLE-PICHER LEAD COM-
PANY, A CORPORATION.

AND

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below denying the motion of the National Labor Relations Board for judgment on its petition to vacate portions of the decree and to remand (R. 307-311) is reported at 141 F. (2d) 843. The court's memorandum

opinion granting permission to the Board to file the petition (R. 281) is not reported; its order denying petitioners' motion to modify the decree or to remand (R. 343) was entered without opinion. The court's opinion enforcing the Board's order (R. 187-208) is reported at 119 F. (2d) 903. The findings of fact, conclusions of law, and order of the Board, as amended (R. 25-180, 181-182), are reported in 16 N. L. R. B. 727-882 and 18 N. L. R. B. 320.

JURISDICTION

The order denying the Board's motion for judgment on its petition to remand and dismissing the petition (R. 311-312) was entered by the court below on April 19, 1944. The Board's petition for rehearing was denied May 17, 1944 (R. 343). The order denying petitioners' motion to modify the decree or remand was entered by the court below on May 17, 1944 (R. 343). The petition for a writ of certiorari, filed by the Unions, was granted on October 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Circuit Court of Appeals, which previously had entered a decree enforcing an order of the

National Labor Relations Board, erred in denying the Board leave to reconsider the back-pay provisions of the order and decree, notwithstanding that the Board had made errors in its award which, in the light of newly-discovered evidence as to the availability of employment during the period both prior and subsequent to the Board's order, inevitably result in a substantial distortion of the back-pay remedy.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, pp. 60-63, *infra*.

STATEMENT

In proceedings instituted upon charges filed by the petitioners, International Union of Mine, Mill and Smelter Workers, Locals Nos. 15, 17, 107, 108, and 111 (hereinafter called the Unions), the Board found that the Eagle-Picher Mining and Smelting Company and its parent, the Eagle-Picher Lead Company (hereinafter called the Companies), had committed unfair labor practices in violation of Sections 8 (1) and (3) of the National Labor Relations Act (R. 25-128), and entered an order, on October 27, 1939, requiring them to cease and desist from their unfair labor practices and to take certain affirmative action, including the reinstatement of 209 employees with back pay to be computed according to a formula set forth in the Board's decision (R. 166-180,

181-182). On June 27, 1941, on petition of the Companies for review and on request of the Board for enforcement, in which the Unions joined as interveners (R. 182-184, 185), the court below entered a decree enforcing the Board's order, with modifications not here material (R. 208-212). On August 23, 1941, the Companies offered reinstatement to the 209 employees (R. 224, 287). On or about May 1, 1942, the Companies tendered the sum of \$8,409.39 as full payment of all the back pay due under the decree (R. 224-225, 287-288). Subsequently the Companies withdrew their tender of \$8,409.39, and averred that \$5,400 was the full amount due and owing (R. 225). Thereupon, the Board, in accordance with its usual compliance procedures, examined the payrolls and records of the Companies to verify the accuracy of the Companies' computations and to ascertain whether the affirmative provisions of the order had been fully executed (R. 225-226, 287). During the course of its compliance investigation, the Board became convinced that the provisions of its order relating to back pay contained certain errors and mistakes, and that in framing such provisions it had misconceived the facts as to the availability of employment with the Companies, both prior to and since the hearing, for the 209 employees (R. 216-217). The Board and the Unions each filed petitions in the court below requesting a remand to the Board of so much of the proceedings as was necessary to permit the Board to reconsider its back-

pay remedy (R. 215-230, 231-280, 329-342).¹ The facts upon the basis of which the remand was sought were as follows:

On May 8, 1935, a strike caused mines, mills, and smelters operated by the Companies to be closed down for a period of several weeks (R. 39-40). At the hearing before a trial examiner of the Board, evidence was introduced that after resumption of operations on or about June 12, 1935, and continuing after July 5, 1935, the effective date of the National Labor Relations Act, the Companies discriminatorily refused to rehire the 209 employees, also called the claimants (R. 45, 74-99, 130-131, 172-176). Defending against the charge of discrimination, the Companies introduced evidence to show that the number of workers employed by them was drastically reduced after July 5, 1935. The Companies' evidence showed that after operations were resumed, mines were sold, operations at other mines were suspended, and that a reorganization of production methods resulted in reduction in the size of crews, the abolition of specific jobs and, in general, a need for fewer employees (R. 10-18, 185-186). The Companies also contended that in restaffing

On August 9, 1943, the court below entered an order treating the Board's petition "as a request for leave to file a petition in the nature of a bill of review" and permitting it to be filed as such (R. 281). The petitioners' motion was filed pursuant to leave granted by the court May 17, 1944 (R. 326).

after the strike, they quickly eliminated new employees to make room for former employees who applied (R. 17-18), and that over ninety percent of those working after the strike had been regular employees before the strike (R. 9). The Trial Examiner recommended reinstatement of some of the claimants with back pay (R. 30). The Companies excepted to these recommendations, stating that as to each such claimant the recommendation "ignores * * * that there is no evidence that said person's former employment or any employment with the respondents or either of them was available on and after July 5, 1935"; that such claimant's former employment had "disappeared due to a change of operations" and was no longer available; and, further, that such recommendation "ignores the evidence of respondents' requirements and availability of work * * *" (R. 18-21, 219).

The Board found that although, as the Companies had urged, there had been a reduction of operations after the strike, the claimants had, on July 5, 1935, and at all times thereafter, been discriminatorily excluded as a class from such jobs as were available (R. 94, 98-99, 101, 132, 166). The Board determined that the claimants should be reinstated (R. 131). It pointed out in its decision that while in such situations it ordinarily required the employer to make whole each employee by paying him a sum equal to the wages he would have earned with the employer during

the period of discrimination less his net earnings elsewhere during the same period (R. 132), it would depart from the general form of remedy in this case because the number of jobs available for all employees on and after July 5, 1935, appeared to be insufficient to take care of all claimants and other old employees who applied for work (R. 94, 98, 132-133). Since all the employees were equally qualified for most positions, and no special skill or abilities ordinarily were necessary, the Board assumed that, in absence of discrimination, the claimants, upon resumption of operations, would have shared in employment opportunities proportionately with the other old employees who applied for work, hereinafter called reapplicants (R. 100, 101, 102, 132). However, the Board found it impossible to determine which specific claimants normally would have been rehired (R. 132-133). Turning "to the only solution that seems fair, workable, and calculated to serve the purposes for which it is intended," the Board directed that reimbursement to the claimants be effectuated pursuant to a special arithmetical formula which it thereupon devised (R. 133).

The Board prefaced its discussion of the back pay provisions of its order as follows (R. 132):

In cases where we have found that certain employees were discriminatorily discharged or refused reinstatement, we have ordinarily ordered the offending employer

to make them whole with back pay, this being an amount equal to what they would have earned with the employer from the date of the discrimination to the date of reinstatement pursuant to our order, less net earnings elsewhere during the same period. *The objective is, of course, to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. Our order in the present case is designed to achieve the same objective, but the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo.* Thus, there were approximately 1,100 employees working for the respondents on May 8, and by July 5, 1935, only approximately 600. Of the 500 not working then, some 350 are claimants in this case; and we have found discrimination as to about 200. We have found above that after July 5, 1935, a substantial number of additional men were put to work, but it is apparent from the record that the total pay roll fell a good deal short of the 1,100 figure obtaining before the strike. Thus we have the following situation: had the respondents acted lawfully in restaffing their force, there is no certainty that all the claimants found to have been discriminated against would have returned to work, since there were presumably at all times less jobs open than old employees available. It is certainly fair to assume, on the other hand, that a large

number of the claimants discriminated against would have returned, but here again, we cannot tell which ones. * * *

[Italics added].

In substance, the formula devised by the Board was as follows: The amount of "all wages" paid by the Companies "to all persons hired or reinstated" from and after July 5, 1935, until the date of compliance by the Companies with the reinstatement provisions of the Board's order should be computed as a lump sum (R. 133). Since it could not be assumed that the claimants alone would have received the available jobs had the Companies acted lawfully, the Board directed that only a proportionate amount of the wages constituting such lump sum should be allocated to the claimants (R. 133-134). This proportion was based upon the ratio which the claimants bore to the total number of claimants plus other prestrike employees seeking their jobs back on and after July 5, 1935. As a method of arriving at this governing proportion, the Board specified that a fraction be constructed, which should have for its numerator the number of claimants, and for its denominator the number of claimants plus other prestrike employees seeking their jobs back, on or after July 5, 1935, whether successfully or not, called reapplicants (R. 134). The Board directed that so much of the lump sum as was embraced by this fraction be apportioned among the claimants, after deducting from the distributive share

of each the sum, of his net earnings elsewhere (R. 134). Illustrating its purpose, the Board gave a hypothetical example in which the lump sum amounted to \$360,000, and there were 200 claimants and 100 reapplicants. Since presumably "two-thirds of the number of jobs would have gone to claimants discriminated against, had the respondents acted lawfully * * * two-thirds of the lump sum, or \$240,000, would be the basic sum to be divided among the claimants discriminated against" (R. 134).

Neither the Board's order nor the decree of enforcement fixed the amount of back pay in dollars and cents; the determination of the exact sum was left to be made after the claim period would be closed by reinstatement of the employees.² Here the hearing closed April 29, 1938 (R. 27), and the period for which back pay was due under the Board's order and the court decree enforcing it did not close until August 23, 1941, when the period of discrimination was terminated by the Companies' offer of reinstatement to the 209 employees (R. 224, 287). In its investigation and analysis of the Companies' records begun immediately after the Companies' tender on or about May 1, 1942 (see p. 4, *supra*), and completed in October 1942, the Board discovered that the Companies at virtually all times after July 3, 1935, had jobs opening up in numbers equal to and at time in excess of the

² This is the usual practice, *infra*, pp. 29-32.

total number of claimants and reapplicants, and at virtually all times had such positions available for all claimants and all reapplicants (R. 224-226, 268-280, 287, 294-296, 301-302, 305-306). The Board concluded, therefore, that it had been led into error by the Companies' evidence and contentions that at no time after the strike had jobs been available for the full number of claimants and reapplicants (R. 216-223). The Board found that because of its misconception as to the employment situation, its prior back pay order was "grossly unsuited to the situation which has now been discovered actually to have existed prior to and since the hearing" (R. 217).

The Board's petition in the court below summarized the foregoing facts and requested the court to enter an appropriate order to permit the Board to reconsider the back-pay provisions of its remedy (R. 213-230). The petition advised the court below that, in the event of such a remand, "the Board will for the first time be in a position to consider and, pursuant to its statutory duty, will consider the actual facts in order to prescribe a remedy appropriate to the true conditions. The Board can then correct the gross inequity now discovered and adequately provide for the effectuation of the purposes of the Act and the protection of the public interest" (R. 229).

The formula which the Board devised because of its understanding with respect to curtailed em-

employment opportunities was also found to contain an obvious mistake which, while relatively harmless in the employment situation then understood by the Board, served to reduce back pay, in the light of the facts subsequently disclosed, to but a small fraction of the intended sum.³ The Board asked the court below to remand on the basis of the inapplicability of the formula as a whole, which included the footnote in which this mistake occurred; the mistake was specifically called to the court's attention by the Unions, the petitioners here (R. 336). In its memorandum filed in this

³ While a dispute exists between the parties as to how much back pay is due, assuming the Board's decision must be applied without correcting the mistake, there can be no doubt that the mistake reduces the back pay to less than one-fourth of the amount which the claimants would have received under the Board's usual back-pay remedy. According to the Board's calculations, based upon its investigations, the 209 claimants, under the Board's normal remedy of full back pay, would receive approximately \$800,000 in reimbursement for the net loss which they had sustained, after allowance for interim earnings elsewhere (R. 227-228). Apportionment among the 209 claimants of the sum of \$5,400, which the Companies claim is all that they are required to pay under the back-pay provisions of the Board's order, would afford the claimants recompense for less than three-fourths of one percent (.0075) of the loss which the Companies willfully caused them during its six-year period of refusal to comply with the Act (R. 228). The Board's computations of the amount which would be due if the mistake remains uncorrected, while not yet complete because of the prolixity of the elements involved and the time-consuming process which the mistake imposes, nevertheless indicate that the claimants will lose more than 75 percent of the amount which they would have earned had the Companies acted lawfully.

Court (p. 11) ~~the~~ Board admitted that the formula contains the mistake which the Unions set forth in their petition (pp. 10, 20-21), and that such mistake renders the formula wholly inaccurate as a measure for back pay. This mistake appears in footnote 185, which provides (R. 133):

If at any given time during this period [of discrimination] the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum.

Correctly worded so as to achieve the Board's stated objective, footnote 185 should read:

If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against *plus the number of old employees reapplying*, only the earnings of a number of such employees equal to the number of claimants discriminated against *plus the number of old employees reapplying* shall be counted in computing the lump sum.

The omission of the italicized words from the footnote causes the back-pay award to depart from the Board's expressed intention to make the claimants whole to the extent that employment opportunities for claimants and reapplicants would have

permitted their employment, had it not been for the discrimination. Instead of limiting the back pay provided for the claimants to the full amount of their loss as a group, or dispensing with the formula entirely during periods of full employment, the literal effect of the footnote is illogically to limit the lump sum to the earnings of 209 employees, this being the number of claimants. Yet this is not the lump sum which is divided among the 209 claimants; only the smaller amount which results from reducing the lump sum by applying the governing proportion is divided among the 209 claimants. If the formula were to be retained, the lump sum obviously should include the earnings of all employees reflected in the governing proportion. Consequently, the claimants, even where full employment was available, are limited to a small portion of their loss in wages.*

*The formula likewise illogically requires that in determining the net amount of back pay due, there be deducted from the pro rata gross share of each claimant as computed under the formula, the full amount of such claimant's net interim earnings (R. 134-135), whereas the theory upon which the formula was devised would warrant deduction only of a pro rata share of his net interim earnings. The formula is based on the assumption that, even though there had been no discrimination in rehiring, not all of the claimants would have been rehired, and because it was impossible to determine which would have been rehired, the formula provides that each should get a pro rata share of the amount of wages which would have gone to those who would have been reemployed. On the same assumption, the Companies should be entitled to credit only for the earnings of those who would have been rehired, and since it is impossible to determine

On November 16, 1943, on the record and on the admissions contained in the Companies' answer to the Board's petition, the Board moved that the court below enter a judgment permitting the Board to reconsider its remedy as requested in its petition (R. 293-304). On April 19, 1944, the court denied the Board's motion and dismissed its petition for remand (R. 307-312). The court treated the petition as "in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence" the back-pay provisions of the prior decree entered by the court in enforcing the Board's order (R. 307). It stated that it was "not persuaded that the Board departed from the form of order by which it 'ordinarily ordered the offending employer to make them [discriminatorily discharged employees] whole with back pay'

those individuals, the amount of net earnings to be deducted should be pro-rated on the same basis. Failure to provide for such a pro rating of the earnings to be deducted means that while only part of the claimants are treated as having worked for the Companies insofar as their recovery of wages is concerned, they are all assumed to have been working when it comes to reducing the liability of the Companies for making them whole.

Also, since the number of claimants and reapplicants varies from week to week, the formula is ambiguous as to whether a single governing fraction, based on the average or on the maximum numbers of claimants and reapplicants, or successive governing fractions, based on the actual numbers, are to be constructed for the period of discrimination.

And, finally, the formula fails to define the "average earnings" referred to in the last sentence of footnote 185 (R. 133). For convenience's sake, a detailed discussion of this point appears in Appendix B, *infra*, pp. 63-65.

in the present instance because of an understanding or determination by the Board as to the number of men the company was employing, or as to the number of jobs brought into existence by such employment or as [to] the composition of the staff of workmen" (R. 309). It therefore concluded that the back-pay provisions of the decree were not "obtained by misrepresentation or wrongful conduct of the companies" (R. 310). The court also stated that it was not convinced "that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved" (R. 310-311).

The Unions' request for modification of the decree or remand, (R. 327-342), filed pursuant to leave (R. 326), and the Board's petition for rehearing, in which the Unions joined (R. 337), were denied on May 17, 1944 (R. 343).

SUMMARY OF ARGUMENT

I

The Board decision of October 27, 1939, included detailed findings as to the Companies' course of conduct which, as to the job discrimination pertinent here, ripened into unfair labor practices when the National Labor Relations Act became effective on July 5, 1935. Upon the basis of its findings of unfair labor practices, the

Board ordered the Companies to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action included the requirement that 209 striking employees be "made whole" by payment to them, following a formula prescribed by the Board, of the wages which they would have earned had it not been for the discrimination, minus deductions for sums representing their interim net earnings. Only paragraphs 2 (d) and 3 (b) of the Board order and court decree, containing provisions intended to make whole the victims of the unfair labor practices, are involved here.

Unlike the findings of unfair labor practices, which were based upon a complete record made at the hearing before the Trial Examiner, the Board's make whole remedy, like its reinstatement remedy, was necessarily based, in part, on assumption and hypothesis. Once the facts as to the unfair labor practices are established, it is not the Board's practice to make findings in the original proceeding concerning the detailed employment situation which has existed subsequent to the discrimination, and the Board did not do so in this case. It has been the Board's consistent view that such matters should properly be reserved to the compliance stage. As to availability of employment, bearing upon the remedy of reinstatement and back wages, a Board order customarily

speaks as of a date earlier than either the court decree or the entry of the order; it is of a provisional, continuing character which must be shaped to changing conditions. On the question of the availability of employment, the make whole remedy here spoke as of the date of the discrimination, in 1935.

The formula which the Board designed in the present case now appears, in the light of newly-disclosed evidence relating to availability of employment subsequent to the unfair labor practices, to be wholly although unintentionally inadequate. The Board resorted to a special formula in order to achieve its expressed intention to restore the situation as nearly as possible to that which would have existed in the case of the 209 employees had it not been for the Companies' unfair labor practices. The formula was used solely because of the Board's understanding that full employment did not exist for all 209 claimants and all other pre-strike employees reapplying on and after July 5, 1935. This is clear from the face of the Board decision, and is confirmed by the Board's treatment of the back pay problem in other cases. The make whole principle which the Board has consistently applied requires that the employer pay to the victims of discrimination a sum of money equal to that which they would have earned but for the unfair labor practice, less a sum representing the net earnings or equivalent of the employees during such period. Usually the employee so dis-

criminated against is readily identifiable, and the amount of the back wages due him can be computed by reference to him alone. Complicated problems may arise, however, where, interwoven with the evidence of discrimination, it appears that there is not in fact sufficient employment available for all of the persons in the group discriminated against. In the case of a union group it may often be impossible to tell which employees, or the order in which such employees, would be discharged, laid off, or reinstated. Even in such cases, nevertheless, the measure of the employer's liability remains constant: his liability is the sum which the union men would have earned but for the discrimination. In situations where the Board has resorted to a "lump sum" formula, the employees rather than the employer are affected by the use of a special remedy. As to them, each is not made whole on an individual basis, but the earnings of the number which, but for the discrimination, would have retained their jobs are distributed among the whole group in proportion to their individual rates of pay.

The present case, on the employment situation as then understood by the Board, presented the lump sum problem in an aggravated form. The framing of a proper formula presented difficulties of construction which inadvertently resulted in the mistake appearing in footnote 185. The obvious purpose of footnote 185 was to protect the Companies against payment to the 209 union men of sums of money during any given period in

excess of what their actual earnings would have been with the Companies—in other words, to avoid their being made more than “whole”. This purpose would have been achieved by limiting the earnings going into the lump sum to those of a number of employees equal to the 209 claimants plus other pre-strike employees applying for work on and after July 5, 1935. The error of the footnote consists in its placing the number of employees whose earnings are to go into the lump sum at the lower ceiling of 209. Thus, in a situation where the number of persons newly hired or reinstated after July 5, 1935, exceeds 209, and *a fortiori* in the situation of full employment which is now understood to have existed, the back pay formula is grossly inadequate and makes the group of the 209 union men far less than whole. The remedy as it now stands and the resulting injustices are solely the result of the Board’s misunderstanding of the employment situation, combined with the error in footnote 185.

II

In the light of the provisional nature of the back pay portions of the Board order and court decree, the court below was right insofar as it held that it retained jurisdiction over these provisions of the decree. In this respect the holding was in accord with *United States v. Swift*, 286 U. S. 106, and with the decisions of other circuit

courts of appeals under the National Labor Relations Act and the Federal Trade Commission Act. We believe, however, that the court below acted improperly in denying the Board leave to reconsider the appropriateness of the back pay provisions of the order and decree. The basic problem underlying the request to remand was whether, in the light of newly discovered evidence as to the actual employment situation between July 5, 1935, and the date of the offer of reinstatement, the "make whole" remedy devised by the Board on the basis of hypothesis and probability should be modified in order to effectuate the policies of the Act. The precise question presented to the court below was whether the Board should be given an opportunity to consider all the relevant factors for the purpose of proposing modification of the decree. The Board could bring to the consideration of these matters a background and experience which the court lacked. After hearing the parties and ascertaining the actual facts of the employment situation, the Board would be in a position to point out specifically the respects in which its former remedy failed to achieve the statutory objective, and to propose concrete modifications in the court's decree. Any modification proposed by the Board would have legal sanction only after approval by the court and inclusion within its decree. On the facts alleged in the petitions and on the showing made, we believe that

it was error for the court below to refuse to vacate paragraphs 2 (d) and 3 (b) of the decree and to remand this portion of the cause to the Board for further consideration.

Many additional considerations support this view. The National Labor Relations Act gives the Board broad authority with respect to its remedy, an authority which survives the entry of an enforcing decree by the reviewing court. This has been recognized by decisions of this Court and of the circuit courts of appeals. *United States v. Morgan*, 307 U. S. 183, and other decisions of this Court emphasize the necessity for "coordinated action" between court and administrative agency in effectuating the policies declared by Congress.

The manner in which the court below disposed of the Board's and Unions' petitions evidenced a misconception of the proper rôle of the Board in situations of this character. The court misconstrued the purpose of the Board in devising the original make whole remedy. In effect, the court reversed the relationship between itself and the Board in the matter of remedy, and attributed to the Board a novel and erroneous theory of "divided damages" which is inconsistent not only with the Board's expressed purpose in the present case but also with the make whole principle which the Board has consistently followed in other cases.

ARGUMENT

IN THE CIRCUMSTANCES OF THIS CASE THE COURT BELOW ERRED IN DENYING THE BOARD LEAVE TO RECONSIDER THE APPROPRIATENESS OF THE BACK-PAY PROVISIONS OF THE ORDER AND DECREE

I

The issues now before this Court will emerge more clearly, we believe, if the remedial provisions of the Board's order, and the court decree enforcing it, are fully analyzed. The Board decision of October 27, 1939 was based upon evidence adduced at a hearing before a Trial Examiner at Joplin, Missouri, from December 6, 1937, to April 29, 1938. The Board found a course of conduct on the part of the Companies which, as to the job discrimination here involved, ripened into unfair labor practices when the National Labor Relations Act became effective, on July 5, 1935. The decision of the Circuit Court of Appeals, issued May 21, 1941, affirmed all material findings of the Board as to the unfair labor practices, and no application for certiorari was made by any party. Neither the Board nor petitioners have sought to reopen any part of the cause relating to the unfair labor practices found to have been committed, to adduce additional evidence or secure the making of additional findings of unfair labor practices within the scope of the original complaint or otherwise, or to substitute any new or different theory of law as to the

unfair labor practices from that underlying and expressed in the Board and court decisions.

Upon the basis of the unfair labor practices found by the Board, and subsequently affirmed by the court, the Board devised and the court approved certain remedial action. Negatively, the Companies were required to cease and desist from their unfair labor practices, both in general terms and in certain detailed respects; affirmatively, the Companies were required to take action which included the reinstatement and making whole of the group of employees against whom discrimination had been practiced. The men were subsequently reinstated on August 23, 1941, and, for present purposes, it may be assumed that the other affirmative remedial requirements have been satisfied, apart from those requiring that the employees be made whole. As to the latter, however, the Companies have not yet settled their accounts with the 209 men; no payments have yet been made. The petitions for remand relate solely to paragraphs 2 (d) and 3 (b) of the Board order and court decree, which contain the "make whole" provisions. The Board did not seek to visit findings of new unfair labor practices upon the Companies, but only to remedy unfair labor practices long since determined to have been committed. It sought from the court below only an opportunity to consider, in the light of such new facts regarding the employment situation as might be developed at a hearing, whether the back

pay remedy previously chosen was ill-adapted to achieve the Board's expressed intention of making whole the victims of the Companies' unfair labor practices.

Unlike the findings of unfair labor practices, which were based upon a lengthy record containing a complete picture of the facts, the reinstatement and back pay remedies devised by the Board and affirmed by the court below were of necessity shaped in the light of assumption and probability. As the Circuit Court of Appeals for the Second Circuit said, speaking of a somewhat similar situation, "In thus striving to restore the status quo, the Board was forced to use hypothesis and assumption instead of proven fact." *F. W. Woolworth Co. v. National Labor Relations Board*, 121 F. (2d) 658, 663. The Companies could properly be required to reinstate the group of 209 striking employees, who, as the unfair labor practice findings showed, had been discriminatorily denied consideration for jobs which were actually available on and after July 5, 1935—but the whole 209 could be reinstated only to the extent that sufficient jobs actually came into existence to take them back on a non-discriminatory basis in company with other old employees reapplying. The Companies were obliged to reinstate the 209 men to positions available on a non-discriminatory basis but were not obliged to purchase new mines or enter a new business for this purpose. See,

e. g., *Southport Petroleum Co. v. National Labor Relations Board*, 315 U. S. 100, 106; *National Labor Relations Board v. New York Merchandise Co., Inc.*, 134 F. (2d) 949 (C. C. A. 2). The Board might perhaps have undertaken to make detailed findings as to the number of jobs available for the claimants at all times from July 5, 1935, to April 29, 1938, the day the hearing closed. But following its usual practice, the Board did not do so; and even if it had done so, this would not have provided sufficient data to have determined the employment situation at the date of compliance and thus irrevocably to have fixed the Companies' obligation under the Board order and court decree. In view of the Companies' claim that the employment level was continuously reduced after July 5, 1935, the Board, without attempting to make findings which could not have fully answered the question in any event, sought to frame its remedy of reinstatement so as to require the Companies to discharge their full obligation of reinstatement but not to require them to go further. Accordingly, the Board's order, as enforced by the court below, provided that each Company should reinstate those of the 209 men who were its employees or, to the extent that positions were not available, should place them upon a preferential list. (Sections 2 (c) and 3 (a) of the Board order and court decree; R. 168-169, 170-171, 210, 211.)

The same considerations applied to the make whole requirement. The actual loss to each employee could be computed only after the reinstatement provision had been complied with, thus bringing to an end the back-pay period. Here, as in the case of reinstatement, the Board followed its usual practice and did not attempt to make findings as to the actual losses suffered as a result of the Companies' violation of the Act. Since it appeared from the evidence relating to the unfair labor practices in 1935 that the level of employment was reduced after July 5, 1935, and since the Companies at all times contended that this situation had continued, and since, moreover, it seemed impossible to determine the order in which the 209 men would have been returned to work, had it not been for the discrimination, the Board sought to construct a remedy which to the fullest possible extent would conform to the make whole principle.

In short, the Board decision did not look to the employment situation subsequent to the period during which the Companies' course of discrimination was set, in 1935. So far as the availability of employment for the claimants was concerned, bearing upon the remedy of reinstatement and back wages, the Board order spoke as of 1935.

The portion of the decision which treated the Companies' discriminatory refusal to reinstate the 209 strikers, in violation of Section 8 (3) of the

Act (R. 74-117, 165-166), included findings, not disputed, that the pre-strike level of employment had not been reached on July 5, 1935, and that between then and November 1, 1935, several hundred additional jobs were filled (R. 94). On this basis, the Board concluded that "on and after July 5, 1935," the Companies "had jobs available at least to the extent indicated by the above figures" (R. 94). Unlike the case of a discharge from existing employment, this reference to the employment situation subsequent to the effective date of the discrimination, coupled with the findings that the strike remained current on July 5, 1935, and the strikers thus retained their status as employees (R. 94-96), that they were available for work (R. 96-98), and that absent discrimination they would have shared the jobs opening up with the other old employees (R. 98-99) went to the establishment of the unfair labor practices in violation of Section 8 (3) (R. 99, 166). See the opinion of the court below in enforcing the Board order, R. 189, 190, 197, 198-199, 203-207. However, the Board did not go further and make findings, or regard as in issue, the number of strikers which could in fact be reinstated or the wage loss of the group, during any period of time, even to the date of the hearing before the Trial Examiner. The Board did consider and determine the status of certain categories of employees who for various additional reasons the Companies asserted they had not "discriminated against" (R. 99) or should

not be required to reinstate (R. 99-117). But even these findings, except in the cases of a few individuals. (R. 109, 111-117); did not touch upon events occurring after 1935, and none was directed to the question of job availability after 1935.

Similarly, in discussing the remedy (R. 129-165); the Board made no findings as to the Companies' employment situation after 1935 but referred only to its findings made in connection with the unfair labor practices (R. 132). Although ordering that in any event they should be reinstated (R. 131), the Board did make findings as to whether certain individuals had obtained other "regular and substantially equivalent employment," (R. 136-165), but only because, until this Court settled the question in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 189-197, the argument was pressed that the obtaining of such employment terminated the Board's reinstatement power. (It may be noted that since the *Phelps Dodge* case, and the Board's considered treatment of the bearing of equivalent employment upon reinstatement in *Matter of Ford Motor Company*, 31 N. L. R. B. 994, 1099-1100, evidence is no longer taken, and findings are no longer made by the Board, even as to this aspect of compliance. See *National Labor Relations Board v. Regal Knitwear Co.*, 140 F. (2d) 746 (C. C. A. 2), certiorari denied as to this point, October 9, 1944.)

The Board's treatment of the instant case accorded with its general practice.³ This practice of not adducing evidence as to the amount of back pay due (see its *Fifth Annual Report*, Government Printing Office, 1941, p. 128) or other matters relating to the remedy in unfair labor practice hearings, or otherwise prior to Board order and court decree, has been noted by the courts, including the court below. *National Labor Relations Board v. New York Merchandise Co., Inc.*, 134 F. (2d) 949, 951-953 (C. C. A. 2); *Marlin-Rockwell Corp. v. National Labor Relations Board*, 133 F. (2d) 258, 261 (C. C. A. 2); *Corning Glass Works v. National Labor Relations Board*, 118 F. (2d) 625, 630 (C. C. A. 2); *National Labor Relations Board v. Brashear Freight Lines, Inc.*, 127 F. (2d) 198, 199 (C. C. A. 8); *National Labor Relations Board v. Newberry Lumber Co.*, 123 F. (2d) 831, 839 (C. C. A. 6); *National Labor Relations Board v. Fashion Piece Dye Works, Inc.*, 100 F. (2d) 304, 305-306 (C. C. A. 3); *Mooresville Cotton Mills v. National Labor Relations Board*, 97 F. (2d) 959, 963 (C. C. A. 4); *Agwelines, Inc., v. National Labor Relations Board*, 87 F. (2d) 146, 148 note, 155 (C. C. A. 5). The flexible, continuing nature of reinstatement and

³ At an early period the Board sometimes made findings as to earnings to the date of the hearing, but the pointlessness of doing this (*Matter of Mackay Radio & Telegraph Co.*, 1 NLRB 201, 200-213, 222-224, 235-2 (b), affirmed 304 U. S. 333, 348) led to a consistent practice to the contrary.

back pay orders has led the Circuit Court of Appeals for the Second Circuit to the view, expressed in the *New York Merchandise* case, *supra*, that they are to be interpreted as meaning no more than that reinstatement and back pay constitute "a remedy appropriate to restore the situation to that which the law demands" (134 F. (2d) at p. 952); that they are "interlocutory", rather than peremptory in the sense that they will support a proceeding to punish for contempt (p. 952)*; and that it is the duty of the Board "as an original tribunal and not as the surrogate of the court" (p. 952), following entry of a decree of reinstatement and back wages in the general terms of the Board's order, to resolve all questions relating to reinstatement, to compute the back wages due, and thereafter to have appropriate, specific requirements incorporated in the court's decree (pp. 952-953). This practice was deemed consonant with that directed by the Court in the *Phelps Dodge* case, 313 U. S. 177 (134 F. (2d) at p. 952). Similarly, the Circuit Court of Appeals for the Second Circuit has recognized that the Board's reinstatement and back pay orders do not speak as of the date of the court decree or of their issuance by the Board. In *National Labor*

* We cannot agree that such orders will not support contempt where, at least, there is lacking even a fairly arguable defense to reinstatement or where the employer refuses even to attempt in good faith to compute back wages. Subsequent proceedings in the Second Circuit indicate that contempt will lie in the situations just described.

Relations Board v. Acme Air Appliance Co., 117 F. (2d) 417, 421 (C. C. A. 2), the court said that the Board's order "speaks as of the time of the hearing and is founded upon the record before the Board." And in a subsequent proceeding in connection with the *Corning Glass* case, *supra*, reported at 129 F. (2d) 967, that court, again referring to an employer's defense to a back pay award, cited *United States v. Swift*, 286 U. S. 106, 114, 115, and held that "the continuing nature of a back-pay order may call for adjustment because of new facts which have occurred after the conclusion of the Board's hearing which led to the entry by the Board of such an order" (129 F. (2d) at p. 972).

Even though the Board's back pay, or "make whole", orders require money payments, no analogy can be made to common law money judgments. The remedial provisions of Board orders are based upon statutory proceedings "unknown to the common law". *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48. The make whole remedy in the aspect here involved,

As we have stated (*supra*, pp. 17-18, 27-28), in the present case, as well as generally, we believe that the Board order speaks as of the date of discrimination rather than even the later date of the hearing. The court was probably right in the *Air Appliance* case, however, since it there referred to the employer's possible defenses to the reinstatement and back-pay provisions which, to the extent they then existed, would presumably have been interposed at the hearing. Cf. *Marshall Field & Co. v. National Labor Relations Board*, 318 U. S. 253.

like other Board back pay awards made prior to agreement upon or determination of the specific amount due in dollars and cents, is thus of a provisional and continuing nature which must be shaped to events occurring subsequent to the time as of which it speaks; here the date of the discrimination is 1935. In *United States v. Swift*, 286 U. S. 106, this Court distinguished between types of provisions appearing in equity decrees, some of which are not subject to subsequent modification, and others of which may be shaped to later events. If an analogy to equity decrees be sought, the make whole provisions involved here can hardly be characterized as "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change"; they fall rather within the category of orders which "involve the supervision of changing conduct or conditions and are thus provisional and tentative" (286 U. S. at 114).

In the light of the employment condition which it now appears has existed at substantially all times since July 5, 1935, the formula which the Board devised in the present case in order to make whole the 209 employees is utterly although unintentionally inadequate to effectuate the policies of the Act.

Beginning with the first case decided by the National Labor Relations Board, on December 7, 1935, the "make whole" principle has consistently

been followed.⁸ Although the back-pay order has been patterned to fit the circumstances of particular cases, the guiding principle has always been to make the employees whole by restoring their earnings as nearly as possible to that which they would have received but for the illegal discrimination. True, the Board has under special circumstances altogether denied back pay to employees for varying periods of time.⁹ For periods during which the Board awards back pay, nevertheless, the make whole principle has been followed. This means that the employer is required to pay out a sum of money during the relevant period equal to that which he would have paid the

⁸ The first case was *Matter of Pennsylvania Greyhound Lines, Inc.*, 1 N. L. R. B. 1, 51, enforced, *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. In *Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440, 500, the formal language as to back pay contained in the *Pennsylvania Greyhound* order was changed in some respects, but the basic concept of "make whole" was retained. The formula set forth in the *Crossett Lumber* case has since been followed. See *National Labor Relations Board, First Annual Report* (1936), p. 128; *Second Annual Report* (1937), p. 148; *Third Annual Report* (1939), p. 201; *Fourth Annual Report* (1940), p. 99; *Fifth Annual Report* (1941), p. 74; *Sixth Annual Report* (1942), p. 75; *Seventh Annual Report* (1943), p. 52; *Eighth Annual Report* (1944), p. 40.

⁹ This Court has noted (*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 198-199 n) that the Board does not invariably award back pay. Thus, the Board does not award back pay during the period of a strike even where the strike is caused by an unfair labor practice (*Matter of Sunshine Hosiery Mills*, 1 N. L. R. B. 664; *Matter of Lightner Publishing Corp.*, 12 N. L. R. B. 1255); if there is unjustified delay in filing charges before the Board, a deduc-

victim of discrimination if there had been no discharge, lay off, refusal to reinstate, etc., minus a sum representing the net earnings or equivalent of the individual during such period. The individual so discriminated against customarily receives this payment, and is thus made "whole".

Since early in its history the Board has been faced with many complicated situations, such as where, interwoven with the evidence of discrimination, it appeared there was not in fact sufficient employment available for all of the employees

tion is made for the period of the delay (*Matter of Inland Lime & Stone Co.*, 8 N. L. R. B. 944; *Matter of American Creosoting Co., Inc.*, 46 N. L. R. B. 240; cf. *Matter of Crowe Coal Co.*, 9 N. L. R. B. 1149); a deduction is likewise made when a case is reopened after having been closed or withdrawn (*Matter of C. G. Conn, Ltd.*, 10 N. L. R. B. 498; *Matter of Whiterock Quarries, Inc.*, 5 N. L. R. B. 601); if the trial examiner rules in favor of the employer and the Board reverses the ruling, no back pay is ordered for the period when the examiner's ruling stood unreversed (*Matter of E. R. Haffelfinger Co.*, 1 N. L. R. B. 760; *Matter of Kentucky Firebrick Co.*, 3 N. L. R. B. 455; see R. 135); the Board has refused to order back pay where discriminatory discharges were made with honest belief that they were required by an invalid closed-shop contract (*Matter of McKesson & Robbins, Inc.*, 19 N. L. R. B. 778; cf. *Matter of M. and M. Wood Working Co.*, 6 N. L. R. B. 372); and back pay is not awarded for any period during which the worker would not have worked in the absence of discrimination (*Matter of Ray Nichols, Inc.*, 15 N. L. R. B. 846 (plant closed because of business conditions); *Matter of Weiss & Geller, New York, Inc.*, 51 N. L. R. B. 796 (three-month period excluded for childbirth); *Matter of Atlas Mills, Inc.*, 3 N. L. R. B. 10; and *National Labor Relations Board v. Planters Mfg. Co., Inc.*, 106 F. (2d) 524 (C. C. A. 4) (seasonal employees).

marked by the employer for discriminatory treatment. In those cases in which it is clear which employees would have been retained or reinstated had it not been for the discrimination, there is, of course, no serious administrative problem, since the Board can follow its general practice of ordering reinstatement and back pay for the employees who would normally have been so retained or reinstated. It has been necessary, however, for the Board to devise special remedies in those cases in which it is difficult or impossible to ascertain which employees would have been retained or reinstated in the absence of discrimination. In those cases in which it was feasible to use seniority as the basis upon which to determine which employees should have had the jobs, the Board has ordered the employer to reinstate its employees upon such basis and to make whole only such of the employees as receive reinstatement.¹⁰ When, however, the Board can find no satisfactory basis upon which to determine which employees would have been retained or reinstated

¹⁰ *Matter of Timken Silent Automatic Co.*, 1 N. L. R. B. 335; *Matter of Segall-Maigen, Inc.*, 1 N. L. R. B. 749; cf. *Matter of Canas Glove Mfg. Works, Inc.*, 1 N. L. R. B. 519. See also *Matter of Acme Air Appliance Co., Inc.*, 10 N. L. R. B. 1385, 1404-1406, enforced as modified and remanded in part, *National Labor Relations Board v. Acme Air Appliance Co., Inc.*, 117 F. (2d) 417 (C. C. A. 2) (modification and remand on another point) (back pay determined on the basis of the order of reinstatement, even though reinstatement not upon the basis of seniority).

in the absence of discrimination, it generally determines that it is impracticable or impossible to make whole the employees on an individual basis and that it must, therefore, order the employer to make whole as a group all of the employees who have been discriminated against.¹¹ It makes the group whole by means of a "lump sum" formula, i. e., by ordering paid to the group the sum of money which those unidentifiable members of the group who would have had the jobs would have earned but for the discrimination. The sum thus due to the group is divided among all individual members of the group, each receiving a share in proportion to his average annual earnings. There is then deducted from the share of each individual appropriate net earnings during the period involved. This "lump sum" formula has been used by the Board, irrespective of the type of discrimination involved, in cases in which there was less than full employment available during or immediately after the program of discrimination and there was no satisfactory basis upon which to

¹¹ "The plan envisions the men [discriminated against] * * * to constitute an unjustly treated group, and therefore as a group entitled to the composite of wages paid to the group which replaced it. Thus it arrives at restoration of the status quo as near as may be, under the circumstances." *National Labor Relations Board v. American Creosoting Co., Inc.*, 139 F. (2d) 193, 197 (C. C. A. 6), certiorari denied, 321 U. S. 797, modifying 46 N. L. R. B. 240, 254-255, 257-258, and adopting the "lump sum" formula recommended by the Trial Examiner.

determine which employees would normally have been retained or reinstated.¹²

¹² *Matter of Jefferson Lake Oil Co., Inc.*, 16 N. L. R. B. 355, 402-404 (discharges); *Matter of Theurer Wagon Works, Inc.*, 18 N. L. R. B. 837, 873-875 (refusal to reinstate strikers); *Matter of F. W. Woolworth Co.*, 25 N. L. R. B. 1362, 1379-1383, enforced as modified, *F. W. Woolworth Co. v. National Labor Relations Board*, 121 F. (2d) 658, 662-663 (C. C. A. 2) (modification on another point) (lay-offs); *Matter of Ford Motor Co.*, 29 N. L. R. B. 873, 911-914 (lay-offs); *Matter of Ford Motor Co.*, 31 N. L. R. B. 994, 1098-1104 (discharges).

The "lump sum" formula has also been used in other situations in which it was impracticable or impossible to make whole the individual employees discriminated against even though full employment was available. *Matter of Samuel Youlin*, 22 N. L. R. B. 879, 894-895 (discriminatory allotment of work after a strike); *Matter of Acme Air Appliance Co., Inc.*, 10 N. L. R. B. 1385, 1404-1406, enforced as modified and remanded in part, *National Labor Relations Board v. Acme Air Appliance Co., Inc.*, 117 F. (2d) 417 (C. C. A. 2) (modification and remand on another point) (refusal to reinstate strikers, where there was no satisfactory method of determining in what order the strikers should have been reinstated).

Subsequently, when experience with these lump sum formulas disclosed difficulties not theretofore envisioned, the Board began to veer away from such formulas and revert to the usual type of back pay order, in the anticipation that an appropriate mode of determining losses would be evolved at the compliance stage. Thus, in *Matter of American Creosoting Co., Inc.*, 46 N. L. R. B. 240, 254-255, 257-258, the Board instead of adopting the Trial Examiner's recommendation for a "lump sum" formula, issued its usual back pay order. However, the Circuit Court of Appeals modified the Board's order by reinstating the "lump sum" formula as recommended by the Trial Examiner. *National Labor Relations Board v. American Creosoting Co., Inc.*, 139 F. (2d) 193, 196-197 (C. C. A. 6), certiorari denied, 321 U. S. 797. See *Matter of E. H. Moore*, 40 N. L. R. B. 1058, 1091-1092.

For present purposes, it is most significant that the manifest purpose of the Board in using the "lump sum" formulas is not to modify or diminish the total liability of the employer: the gauge of his liability, as in the case of a single discharge, remains the sum which he would have actually paid to the employees but for the discrimination. Use of the "lump sum" formula affects only the employees; it does not enlarge the sum which the employer is required to pay. Since the individuals who would have been retained or reinstated, at all times or at any particular period, cannot be separated from the entire group of claimants, the make whole principle is in effect transferred to the group, and it is the latter as an entity which is in substance made whole.

The instant case, as understood by the Board at the time of its decision, presented the "lump sum" problem in its more complicated form, since here it appeared not only impossible to determine in what order the 209 union men would have been reinstated as among themselves, but in addition it was impossible for the Board on the basis of the evidence then before it to determine the number of jobs opening up and the proportion which would have gone to the union men as a group as compared with the other pre-strike employees reapplying for work on and after July 5, 1935. The formula as sketched by the Board (*supra*, pp. 7-10) contemplated two lump sums—first, the lump sum of all wages paid to employees hired or

reinstated on and after July 5, 1935, and second, the smaller lump sum (which is a fraction of the larger) representing the wages which would have been earned by the claimants. The stated purpose of the Board remained, however, that of restoring the situation as nearly as possible to that which would have existed but for the discrimination (R. 132). Nothing in the decision manifests a purpose on the part of the Board to depart from its uniform practice of gauging the employer's liability by the total sum he would have paid to the union men had it not been for the discrimination.

As shown in the Statement (*supra*, pp. 11-14), the formula works inequitably as soon as the level of employment of persons hired or reinstated on and after July 5, 1935, exceeds 209, the number of claimants. And it became evident, after entry of the decree of enforcement, that the level of employment of new and reinstated employees on and after July 5, 1935, was sufficient at substantially all times after that date to provide jobs both for all 209 union men and all other pre-strike employees reapplying. As applied to the facts as they now appear, the Board's remedy not only produces injustice but is utterly at war with the make whole principle which the Board has uniformly applied in other cases.

No suggestion can be made that the Board in the present case intentionally sought to prescribe something less than the full make whole remedy. Not only does no reason given in the decision sup-

port such a view, but the reason explicitly given by the Board as justification for use of the formula reflects an understanding of the employment situation which has now been shown erroneous (*supra*, pp. 6-10; R. 132).¹³ The supposed necessity of a formula carried in its wake innumerable hazards of construction, which culminated in the framing of footnote 185 (*supra*, pp. 12-14). But the very necessity which gave rise to the formula also served to conceal the significance of such errors until the true employment situation—and hence, paradoxically, the absence of any need for a formula, or at least the instant formula—was discovered. Footnote 185 was obviously inserted only to protect the Companies themselves against a liability in excess of what they would have been obligated to pay in the event of full employment. That the Board entertained not the remotest idea that controversy as to the back pay award would turn on the wording of this footnote is evident, too, from the place it occupies in the decision. And further evidence that the framing of the footnote involved inadvertent error is provided by two subsequent decisions in which, dealing with situations similar to that understood to exist in this case, the Board successfully provided back pay

¹³ In the case of two employees whom the Board found to have been discriminatorily discharged, the ordinary method of computing back pay was deemed applicable and was used (R. 133, n. 184). And see the Board's treatment of the remedy in *Matter of Jefferson Lake Oil Co., Inc.*, 16 N. L. R. B. 355, which was decided just three days prior to the instant case.

to the claimants up to, but not exceeding, the full amount of their loss.¹⁴

Simply as a matter of logical alternatives, in the light of the foregoing, the conclusion seems

¹⁴ *Matter of Ford Motor Co.*, 29 N. L. R. B. 873, 911-914, especially footnote 41, page 912; *Matter of Ford Motor Co.*, 31 N. L. R. B. 994, 1098-1104, especially footnote 219, page 1103.

The case history of *Matter of American Creosoting Co., Inc.*, 46 N. L. R. B. 240, is also pertinent. There the Board's order provided for payment of back pay, in the usual manner, to certain employees found to have been discriminated against. But the Circuit Court of Appeals for the Sixth Circuit modified the order (139 F. (2d) 193, certiorari denied, 321 U. S. 797) by prescribing that back pay be computed on the basis of the Trial Examiner's recommendation that "a lump sum" be established "consisting of all wages, salaries, or other earnings paid out by respondent since December 23, 1937, the date of the application for reinstatement, to employees who had been hired since October 4, 1937, up to the time the respondent complies with the recommendations, * * *, such lump sum to be divided among all the employees listed in schedule 'A,' and each of such employees to receive an amount proportionate to the wages paid him prior to the strike, computed from December 23, 1937, to the date of his reinstatement, or placement on a preferential list, less his net earnings during such period" (pp. 196-197). The formula so adopted by the court contained no provision comparable to a footnote 185, corrected or otherwise, and thus placed no ceiling on the number of new employees whose earnings were to go into the lump sum; a literal interpretation of the court's decree would have required distribution to the claimants, for periods varying from 13 months to 6 years, of all sums earned by all new employees, regardless of the number of such new employees working at any time during the back-pay period.

The Board's files show that investigation after the entry of the decree disclosed that for most of the back-pay period there was a larger number of "new" employees (i. e. em-

inescapable that either footnote 185 was consciously permitted to stand as it now reads, but if so that this was done on a wholly erroneous understanding of the true employment situation,¹³ or that enmeshed in the construction of footnote 185 there was an inadvertent error. Study of the decision has convinced the Board that the latter view is correct, and that solely through oversight the footnote failed properly to deal with the situation obtaining when more than 209 jobs became available on or after July 5, 1935. Failure to discover the consequences of this error in turn was, as we have suggested, undoubtedly due to the

employees hired after October 4, 1937) working than there were claimants entitled to back pay, and for some weeks almost twice as many of the former as the latter. Had the Board literally applied the court's decree, therefore, the claimants, instead of having been made whole for wages lost, would have received sums far in excess of their actual wage losses. Consequently, the Board, in computing back pay, limited the amount to be distributed to claimants for any one week to the earnings of a number of "new employees" equal to the number of claimants. The total of the lump sum, thus computed, and subjected to further deductions for interim earnings, amounted to approximately \$105,000. Had the Board insisted upon literal adherence to the court's formula, the lump sum would have been approximately \$155,000. Thus, where the formula contained a mistake almost precisely the converse of that here involved, the Board applied the remedy not in its literal terms but in keeping with the make whole principle and the evident intention of the court.

¹³ Cf. R. 222-223. It is to be remembered, as further evidencing inadvertent error in the construction of the footnote, that the Board decision itself found that between July 5, 1935, and November 1, 1935, some 269 jobs (864 less 595) had opened up (R. 94).

Board's misconception of the facts relating to available employment. In any event, the remedy as it now stands is wholly inadequate, and would frustrate rather than effectuate the Board's declared purpose of making whole the victims of the Companies' unfair labor practices. In addition, as has already been noted, (*supra*, pp. 14-15n) the formula contains other errors and ambiguities which can be corrected only upon reconsideration of the remedial provisions of the order.

II

In the light of the provisional character of the unexecuted back-pay portions of the Board order and court decree, the court below was right insofar as it held that it retained jurisdiction over these provisions of the decree (R. 311). Cf. *United States v. Swift & Co.*, 286 U. S. 106; *Corning Glass Works v. National Labor Relations Board*, 129 F. (2d) 967 (C. C. A. 2)¹⁸; *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. (2d) 757, 761-762 (C. C. A. 9); *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909 (C. C. A. 4); *Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2); *Century Metalcraft Corp. v. Federal*

¹⁸ In the *Corning Glass* proceeding the Circuit Court of Appeals for the Second Circuit, at the instance of the employer, reopened the back-pay provision of a decree enforcing a Board order some 15 months after the entry of the decree by the court, and remanded that part of the cause to the Board for further action.

Trade Commission, 112 F. (2d) 443 (C. C. A. 7).

We submit, however, that the court erred in denying the Board an opportunity to consider whether, in the light of the discovery of its mistake and of new evidence as to the availability of employment after July 5, 1935, the back-pay provisions of the decree should be modified in order to effectuate the policies of the Act. The court's and the Board, acting within their respective spheres, are to be regarded as collaborators in the task of attaining the ends sought by Congress in enacting the National Labor Relations Act. The jurisdiction of the courts, no less than that of the Board, "must be exercised in light of the large objectives of the Act." Cf. *Hecht Co. v. Bowles*, 321 U. S. 321, 331. We believe that the action of the court below, in the circumstances of this case, is inconsistent with the general principles declared by this Court in *United States v. Morgan*, 307 U. S. 183, 191:

* * * in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those

words should be construed so as to attain that end through coordinated action.

The basic problem raised by the request to remand was whether the make-whole remedy devised by the Board on the basis of assumption and probability should be modified in the light of the actual facts as to the employment situation between July 5, 1935, and August 23, 1941 (the date of the offer of reinstatement). A collateral question interwoven with the Board's failure to devise an adequate remedy as of 1935 involved the Companies' repeated representations as to the employment situation existing subsequent to July 5 of that year. Plainly, the Board could bring to bear upon these matters a background, experience and expertise peculiarly possessed by it. After hearing the parties and ascertaining the facts relating to the employment situation, the Board would be in a position to point out specifically the respects in which its former remedy failed to achieve the statutory objective. If the Board then concluded that through misunderstanding and error the original remedy had fallen short of the Board's expressed remedial intent, it could consider the shortcomings of the remedy not as an abstract matter, but in terms of the handicaps which the erroneous award had imposed and would impose upon the restoration of organizational freedom in the Companies' mines. Upon the basis of such reconsideration, the Board would then be in a position to frame proposed modifications which

would serve to effectuate rather than thwart the basic purpose of the original remedy. See *Chrysler Corp. v. United States*, 316 U. S. 556, 562. In this case it is not only individual workmen who suffer from a failure to rectify the Board's error; the public interest sustains an injury which is more far reaching and lasting. Of course, any modifications proposed by the Board would become effective only after approval by the court and inclusion within its decree.

The Board is authorized to require such affirmative remedial action "as will effectuate the policies of this Act" (Section 10 (c)). Unfair labor practices having been found, the Board is given discretion to shape remedies best adapted to achieve the broad policies of the statute. The Court has frequently pointed out that the Board's judgment as to the appropriateness of a particular remedy should be accorded great weight. For example, in *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 600, the Court said, "The Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged." In *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194, it was observed, "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law onto the more spacious

domain of policy." Indeed, the court below in enforcing the original order in this case noted that the Board's back-pay remedy related only to the means to be employed in effectuating the Act's policies; of the "form and scope" of these means, the court held the Board to be the "sole judge". (R. 207).

Entry of a judicial decree of enforcement does not relieve the Board of responsibility for effectuating the public policy embodied in the National Labor Relations Act. The purpose of the Act is the protection of commerce from industrial strife by the prevention of unfair labor practices. The entire administrative and judicial procedure described in Section 10 is remedial in a prospective sense. The remedial function basically involves a judgment by the Board that if a particular course of conduct is undertaken by the employer, freedom of self-organization will be restored and impediments to the free flow of commerce removed. The rôle of the court is that of arming the Board's remedial requirements with legal sanction once it has ascertained that they fall within the Board's authority. The importance of prevention in the statutory scheme, the prospective operation of the Board-devised remedy, and the broad discretion entrusted to the Board in adapting remedy to policy, all warrant the view that when, after the entry of the decree, facts are discovered which serve to nullify the Board's conclusion that a particular remedy will effectuate the

policies of the Act, the appellate court, notwithstanding that it alone has jurisdiction to vacate or modify its decree, should not deny the Board leave to consider, in the light of such facts, whether modification of the decree is required in the public interest.¹⁷

The Board's continuing responsibility for effectuation of the policies of the Act may be illustrated by various types of cases. Thus, where the order of the Board and the enforcing decree entered by the circuit court of appeals require the employer to bargain with a particular labor organization as the exclusive representative of his employees, the Court has nevertheless assumed a continuing power on the part of the Board, under Section 9 of the Act, to hold new elections and to certify new bargaining representatives. *Inter-*

¹⁷ In *Wallace Corporation v. National Labor Relations Board*, Nos. 66-67, this Term, decided December 18, 1944, this Court observed:

Only recently we had occasion to note that the differences in origin and function between administrative bodies and courts "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *Federal Communications Commission v. Broadcasting Co.*, 309 U. S. 134, 143. With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices. We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes.

national Ass'n. of Machinists v. National Labor Relations Board, 311 U. S. 72, 82-83; *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 705-706. In a somewhat analogous situation, the Circuit Court of Appeals for the Sixth Circuit has held that the entry of a decree does not serve to bring within the exclusive jurisdiction of the court subsequent unfair labor practices encompassed by the decree, but that the Board retains power under Section 10 to proceed to the usual administrative hearing and remedy. *Thompson Products v. National Labor Relations Board*, 133 F. (2d) 637. And see *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261; *Corning Glass Works v. National Labor Relation Board*, 129 F. (2d) 967 (C. C. A. 2); *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. (2d) 757, 761-762 (C. C. A. 9); *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909 (C. C. A. 4).

Under Section 10 (d) the Board may "upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it." *In the Matter of National Labor Relations Board*, 304 U. S. 486. The express power so given the Board under Section 10 (d) expires when a transcript of the record is filed in the reviewing circuit court of appeals, and thereupon withdrawal or remand rests in the sound discretion of the court. *Ford Motor Co. v. National Labor Rela-*

tions Board, 305 U. S. 364. However, nothing in Section 10 (d), or in the further provision of Section 10 (e) and (f) that upon the filing of the transcript the court shall have jurisdiction of the proceeding, deals in explicit terms with the proper distribution of function as between court and Board, after entry of the decree, with respect to reshaping of the remedy to changed conditions. Certainly nothing in these statutory provisions or in the *Ford* case denies the special competence of an administrative agency such as the Board to deal with its remedial orders; they express a procedural requirement necessary to permit the court to dispose of the case before it without the intrusion at the same time of another tribunal. See *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909 (C. C. A. 4). Other provisions of Section 10 (e) and (f), including those empowering the court to grant applications for leave to adduce "additional evidence"¹⁸ and providing

¹⁸ The instant proceeding, of course, does not involve an application to adduce additional evidence (see *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 225-226; *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U. S. 9; cf. *Southport Petroleum Co. v. National Labor Relations Board*, 315 U. S. 100); remand to the Board is sought after entry of the enforcing decree to consider questions touching the remedy upon which, following the usual practice, evidence is not developed in Board hearings. Where remand to the Board has been ordered following entry of an enforcing decree, such action has not been taken under the power of the court to allow applications for leave to adduce additional evidence. *Corning Glass Works v. National Labor Relations Board*, 129 F. (2d) 967

that the jurisdiction of the court shall be "exclusive"¹⁸ and its judgment and decree "final", likewise bear upon the power of the reviewing court only for the period prior to entry of the enforcing decree. The term "final" means that the decree has binding force but obviously does not foreclose reconsideration of the decree in the light of changed conditions developing after the date as of which the Board order and court decree speak.²⁰

(C. C. A. 2). Moreover, it is to be noted that when "additional evidence" is warranted under Section 10 (e) and (f), it is the Board rather than the court which adduces it and which formulates the findings of fact based upon it.

¹⁹ As between circuit courts of appeal in which petitions for review or enforcement are filed, the court in which the transcript of the record is filed has exclusive jurisdiction to review and enforce the Board order. *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 83 F. (2d) 731 (C. C. A. 2); *Hicks v. National Labor Relations Board*, 100 F. (2d) 804 (C. C. A. 4).

²⁰ At the time the National Labor Relations Act was enacted, in 1935, the Federal Trade Commission Act, upon which the court review provisions of the Labor Act were based, had been construed to permit the enforcing court to modify its "final" decree in the light of changed conditions. *Indiana Quartered Oak Co. v. Federal Trade Commission*, 58 F. (2d) 182 (C. C. A. 2). This has also been held subsequent to 1935. *Century Metalcraft Corp. v. Federal Trade Commission*, 112 F. (2d) 443 (C. G. A. 7). As to the proper distribution of authority between court and Commission in this connection see the *American Chain & Cable* case, *infra*, pp. 53-54. The other cases cited, *supra*, p. 44, also establish, of course, the survival of power to modify a continuing order or decree which has become "final" in the same sense of having the full support of legal sanctions. The expression "final" as used in the National Labor Relations Act and in the Federal Trade Commission Act is to be contrasted with that term as

Nor do any of these provisions deny the Board participation in a reshaping of the remedy into a form which will effectuate the policies of the Act.

Support for our contention as to continuing responsibility of administrative agencies for the effectuation of the public interests entrusted to them is provided by the reasoning of the Circuit Court of Appeals for the Fourth Circuit in *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. (2d) 909. After that court had decreed enforcement of an order of the Federal Trade Commission (139 F. (2d) 622), the parties against whom the order was directed petitioned the Commission to stay enforcement of its order until after the present war. As additional relief they asked that the Commission join with them in requesting modification of the decree of enforcement. The Commission denied the motion, taking the position that neither the Commission nor the court had power to stay enforcement of the order at that stage of the proceedings. The petitioners then sought a writ of mandamus to compel the Commission to consider and decide petitioners' motion on its merits. The court granted the application, in order to require the Commission to "exercise the administrative power delegated to it by Congress" (142 F. (2d) at p.

applied to decisions, for example, of the Tax Court of the United States, which are not of a continuing character but which fix specific liability for stated tax years. See *R. Simpson & Co. v. Commissioner*, 321 U. S. 225.

912). It held that the power of a circuit court of appeals over administrative remedial orders "is appellate and revisory merely," and does not include any power to grant or withhold remedial relief after enforcement, a power "essentially administrative in character" (p. 911 and note).²¹ It held further that the court had no power to modify the decree where the Commission had not itself modified its order, "since the decree is based on the order, not on the conditions which called it forth", and stated that "to hold otherwise, would be to clothe the Circuit Courts of Appeals with the administrative powers of the Commission in cases in which they have entered decrees of enforcement" (p. 913). The court observed that "there is no danger that the decree of the Court

²¹ The Circuit Court of Appeals for the Fourth Circuit, in denying a stay of its decree enforcing an order of the Federal Trade Commission in an earlier case, stated that the determination of whether a stay should be granted "is more properly within the province of the Commission than the courts. We are of the opinion that we have no power to order any delay in the putting into effect of a lawful order of the Commission." *El Moro Cigar Co. v. Federal Trade Commission*, 107 F. (2d) 429, 432.

²² In contending that the court below erred in its disposition of the petitions to remand, we do not mean to imply that the court's misunderstanding of the case may not have been attributable, in part at least, to the failure of Board counsel to elucidate the difficult issues presented as completely as has been undertaken in this brief. Questions as to the proper relationship between courts and administrative agencies during the post-decree period represent, of course, a largely unpioneered field.

may be flouted by such modification" (p. 912); for any "action taken by the Commission would then be subject to review by the Court as in the case of other orders * * *" (p. 913).

Finally, the manner in which the court below treated the Board's and Union's petitions to remand further reveals a departure from the proper relations between court and administrative agency in collaborating to effectuate the policies declared by Congress.²² After the Board's petition for remand had been presented to the court below in February 1943 (R. 230), the court, in August 1943, permitted the filing of the petition, but treated it as a "petition in the nature of a bill of review" (R. 281). Its final decision in April of the following year characterized the Board's petition for remand as "a petition in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence" (R. 307). Dismissing the petition, the court stated (R. 310), "We are not convinced upon the showing in these proceedings that the parts of the order and decree attacked were obtained by misrepresentation or wrongful conduct of the Companies, or that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved." The petition of the Board for rehearing and the Unions' petition filed pursuant to leave granted, were denied without opinion (R. 326, 343).

The Board's order plainly showed that, solely in response to the plea of the employer of reduced employment, the Board departed from its normal back-pay remedy and adopted a special formula (R. 132-134, *supra*, pp. 9-11). The court below in denying the remand nevertheless held that "circumstances other than" job insufficiency required the adoption of the formula—although the court failed to particularize such other circumstances (R. 310). The court thus rejected the Board's stated reason for the Board's remedy. It has in effect reversed its own holding on enforcing the Board's order that remedy is an area in which the Board is the "sole judge" (R. 207).²³

²³ Similarly, the court's statement that in decreeing enforcement of the Board's order "The Judges were not in agreement on the fundamental question whether the Board could make any compensatory award to the group of 209 employees at all under the circumstances established" (R. 310) is contrary to the opinion handed down at the time of the enforcement decree and furthermore seems wholly irrelevant to the issue of the Board's power to reconsider. All three judges sustained the back-pay provisions as to the group of claimants generally but one judge believed that, of the 209, a small number of "striking employees who were not shown to have been willing to abandon the strike and to return to work prior to November 1, 1935" should have been excluded from both reinstatement and back pay, because "the absence of evidence to justify a finding that the loss of wages suffered by these members of the group was attributable to the unfair labor practice" made the order penal (R. 207). The majority sustained the Board's findings that the whole group of 209 employees were willing to return at all times after July 5, 1935, if the Companies would reemploy them without imposing the requirement that they join the company-sponsored union (R. 206).

The court also states (R. 310) that in its opinion enforcing the Board's order, "We could not find prejudice to the companies in the formula adopted by the Board * * *; and although it is apparent on the face of it that it does not accord to each individual in the group an amount of back pay equal to a full wage from July 5, 1935, to the date of the offer of reinstatement, and that it specifically provides a fraction only of such full wage, we held that the Board was within its rights in requiring payment of a fraction of such wage prescribed in the formula." But the Board did not intend to limit the employees discriminated against to a fraction of their losses but to make them whole for all wages lost to whatever extent the perspective of job sufficiency might permit (R. 169, 171; *supra*, pp. 7-9). Moreover, in enforcing the Board's order the court shared the Board's assumption that, because of curtailed employment, the sum to be apportioned was the wages lost by the group (R. 203, 207), and did not understand that the apportionment was to be a mere fraction of the wages lost by the group. In now holding that its original decision awarded fractional reimbursement to the men because of circumstances other than the availability of employment, the court has not only departed from its own opinion but has substituted for the Board's reasons for its remedy, new and different reasons, and for the Board's intention to "make whole"

the group of employees a contrary intention to make them less than whole. In effect, the court has attributed to the Board a novel theory of "divided damages" under which the employer and the employees against whom he discriminated as a group mutually share the burdens of the employees' wage losses.

No doubt arguments will be pressed upon the Court to show the undesirable consequences of permitting the Board opportunity to reconsider its remedy. It must be assumed, and we believe this Court would be correct in so assuming, that only in a clear and meritorious case would the Board seek to reopen a remedy embodied in a decree of the reviewing court. The peculiar circumstances of the instant case, however, exercise a force so compelling as to defy *a priori* cataloging. The "make whole" remedy is uncomplished with; the Companies have not settled accounts which are now to be reopened. The purpose unambiguously stated in the Board's decision of making whole the victims of discrimination and of restoring the situation as nearly as possible to that which would have obtained but for the unfair labor practices (R. 132) has been defeated by a misunderstanding of the employment situation as it has in fact developed, by a serious mistake in the formula and by ambiguities not in the Board's stated purpose but in the detailed provisions it adopted to achieve such purpose. If more were needed, the Com-

panies' own representations as to the employment level existing after July 5 1935, unquestionably contributing as they did to the present difficulties, further reinforce the desirability of permitting the Board to reconsider the back-pay provisions. It is submitted that the failure of the court below to permit such reconsideration under the circumstances presented was so inappropriate as to call for revision of its exercise of authority.

CONCLUSION

For the reasons stated, the decision below should be reversed.

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APPENDIX A

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of

additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)..

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction.

to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX B

THE DISPUTE OVER COMPUTATION OF "AVERAGE EARNINGS" AS PROVIDED IN FOOTNOTE 185

The "average earnings" provision of footnote 185 is the basis of dispute between the parties which explains the wide discrepancy in the respective computations of the parties over the liability under the formula even without the correction (*supra*, p. 12). As shown (*supra*, p. 13), footnote 185 states that at any "given time" when the number of new or reinstated employees exceeds the number of claimants discriminated against, the amount to be credited to the lump sum shall be limited to the earnings of a number of such employees equal to the number of claimants discriminated against. The footnote then adds that "in such a case the respondents shall * * * take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum". The footnote does not expressly state that this process shall be followed separately for each given week in which the situation described in it exists. The computation supplied by the Companies indicates that the number of new or reinstated employees exceeded the number of claimants discriminated against during all but the first three of the 320 weeks of the discrimination period. The Companies, in making their computation, have construed the entire 317 weeks in which that situa-

tion existed as the one "given time" for which the average earnings of all new or reinstated employees shall be taken for the purpose of arriving at the amount to be included in the lump sum. They have taken the total of the wages earned by all new or reinstated employees working, no matter for how short a period, during the entire 317 weeks, and divided that total by the aggregate number of new or reinstated employees working at any time during that entire period. By this process of taking a single arithmetic average of earnings of all new or reinstated employees for the entire 317-week period, earnings of employees who worked merely one week and earned as little as \$14 or \$15 were averaged for a total period of over 6 years. Thereby, the Companies arrive at an average of earnings for all new or reinstated employees of the Mining & Smelting Company for the entire 317-week period, of \$1,796.49 (or about \$5.63 a week) and of the Lead Company of \$1,610.70 (or about \$5.05 a week). They have added to the sum allocated to the first three weeks this "average" multiplied by the number of claimants discriminated against. After reduction of this total by the governing fraction representing the ratio of claimants discriminated against to the total number of such claimants plus all old employees reapplying, the Companies, in each case, have arrived at a distributive lump sum which is then apportioned among the claimants individually. Each such share is, in turn, subject to reduction for interim earnings. This explains how the Companies have managed to compute the total net back pay due all the claimants for the entire 320-week period at about \$5400.

The Board's position, if the present formula stands, is that the average earnings of all new or reinstated employees should be taken separately for each week in which the situation envisioned by footnote 185 existed. However, because of the absence of an express statement to that effect, the different positions of the Board and the Companies portend further litigation over the interpretation of footnote 185. And, of course, even if the Board's position as to the amount due under the uncorrected formula is sustained, the employees discriminated against, as indicated (*supra*, p. 12, footnote 3), stand to receive less than 25 per cent of the actual wage losses sustained by them as a result of the discrimination.